Office-Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
CLERK

(3)

Nos. 85-83

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EVELYN ZERMAN, PETITIONER

v.

ANDREW J. MELTON,Jr., ROBERT M. GARDINER, PETER BYRNE and DEAN WITTER REYNOLDS,INC

RESPONDENTS.

ERNEST R. ZERMAN,PETITIONER

v.

PRUDENTIAL-BACHE, LOREN P. LYON, NEW YORK STOCK EXCHANGE,INC., and IRENE SCHONZIET,

RESPONDENTS.

ERNEST R. ZERMAN,PETITIONER

v.

HARRY A. JACOBS,Jr., H.VIRGIL SHERRILL,and PRUDENTIAL-BACHE,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

***** APPENDIX *****

EVELYN ZERMAN,ERNEST R. ZERMAN,Pro Se
2049 Ocean Dr.,Apt.1403,
Hallandale, Fl 33009 (305) 456-1404

28pp

alleged violations of federal and state laws in the handling of her margin securities account with defendant Dean Witter Reynolds, Inc.

Affirmed.

Evelyn Zerman, Hallandale, Florida, *Plaintiff-Appellant pro se.*

JOHN F. X. PELOSO, New York, New York (Dorothy E. Hughes, Sage Gray Todd & Sims, New York, New York), *for Defendants-Appellees.*

Per Curiam:

This is an appeal from a judgment entered in the Southern District of New York dismissing Mrs. Zerman's complaint. In it, she alleged violations of a panoply of federal and state laws in the handling of her margin securities account by defendant, Dean Witter Reynolds, Inc. and three of its employees also named as defendants.

This complaint is merely the latest in a series of actions brought either by the plaintiff or by her husband, Ernest Zerman, against different brokerage houses. *See Zerman v. Jacobs*, 510 F. Supp. 132 (S.D.N.Y.), *aff'd mem.* 672 F.2d 901 (2d Cir. 1981); *Zerman v. Cowen*, 82 Civ. 1232 (S.D.N.Y. March 3, 1983); *Zerman v. Ball*, No. 83-7213 (2d Cir., May 15, 1984). The complaints in these cases allege disturbingly similar circumstances of fraudulent conduct by different brokers occurring over the course of

four years and having to do with purchases of Government National Mortgage Association certificates and other bonds on margin. Viewed in their totality, the allegations of the four complaints indicate that Mr. or Mrs. Zerman purchased bonds on margin, filed a complaint alleging securities fraud, then purchased more bonds through different brokers followed by other complaints. In *Ball*, for example, Mrs. Zerman alleged a failure of the defendants there to inform her of the nature of a margin account at a time just after her husband had filed a complaint in *Jacobs* indicating his unfortunate experience with margin accounts. The complaint in the instant case is remarkably similar to the complaint in *Ball*, again alleging a failure to take into account Mrs. Zerman's status as a housewife innocent of investment complexities. Yet the fraudulent activities alleged in the instant case occurred at a time when the fraudulent nature of the activiti alleged in *Ball* must have become obvious to Mrs. Zerman through the monthly statements she was receiving.

In *Ball*, we reversed as to one allegation of fraudulent misrepresentation which was facially sufficient to survive a motion to dismiss. We noted that her other claims of fraud were insufficient under Fed. R. Civ. P. 9(b) to state a valid claim for relief. We have examined the complaint in the instant case and have concluded that none of her allegations allege fraud with sufficient particularity to survive scrutiny under Rule 9(b). In light of the repetitive actions alleging similar fraud by different brokerage houses over periods of time sufficiently lengthy to have apprised Mr. and Mrs. Zerman of the complexities of their investment transactions and to have sensitized them to their peculiar vulnerability to fraudulent conduct, we

perceive no reason to accord her the usual opportunity to amend a complaint before dismissal under Rule 9(b).

Appellees have moved for double costs and attorney's fees for this appeal. Since it is the totality of the litigation brought by the Zermans which causes skepticism about their claims, and the evidentiary record before us on this single appeal, given the pendency of *Ball*, falls short of demonstrating the bad faith necessary to award such fees, *Nemeroff v. Abelson*, 704 F.2d 652, 659-60 (2d Cir. 1983), we deny the motion. However, repetitive and baseless claims brought to recoup investment losses may lead to such an award.

Since our holding is that the complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief, we need not reach the procedural issues raised by appellant regarding summary judgment.

Affirmed.

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APPENDIX A.5

ORDER DENYING REHEARING- No. 83-7441

(FILED MAR 25 1985)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of March, one thousand nine hundred and eighty-five.

Present: HON. RALPH K. WINTER,
HON. GEORGE C. PRATT,
HON. J. EDWARD LUMBARD
Circuit Judges,

EVELYN ZERMAN,

Plaintiff-Appellant,

v.

No.83-7441

ANDREW J. MELTON, et al.,

Defendants-Appellees.

APPENDIX A.6

A petition for a rehearing having been filed herein by plaintiff-appellant, Evelyn Zerman, pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith

Elaine B. Goldsmith,

Clerk

APPENDIX B.1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - x

EVELYN ZERMAN,

Plaintiff,

-against-

ANDREW J. MELTON,JR.,
ROBERT M. GARDINER,
PETER BYRNE,
DEAN WITTER REYNOLDS,INC.,

Defendants.

MEMORANDUM AND ORDER

82 Civ. 6846(ADS)

(Filed- April 12, 1983)

- - - - - - - - - - - - - - - - x

ABRAHAM D. SOFAER,D.J.:

Plaintiff, Evelyn Zerman, brings this action pro se alleging that defendants violated a panoply of federal and state laws in handling her margin securities account held with defendant Dean Witter Reynolds, Inc., ("Dean Witter"). . . . .

. . . . . .

APPENDIX B.2

PART OF PAGE 6-SOFAER'S OPINION

defendants sold her the GNMA at price $98¼ when, in fact, the security listed at the date of sale at a price between $89 and $91. Id para.34 & Ex.H.

. . . . . .

Plaintiff's second factual recital, which merely indicates errors in book-keeping, also fails to state a claim. See Zerman v. Jacobs, 510 F. Supp. at 134. Absent an adequate showing of scienter - facts indicating an intent to defraud, a reckless disregard for the truth or a knowing use of a device, scheme, or artifice to defraud - plaintiff's claims must fail.

APPENDIX B.3

PART OF PAGE 7-SOFAER'S OPINION

....Defendants have successfully rebutted plaintiff's final clai m of fraud in an affidavit explaining the pricing procedures for GNMA'S. Affidavit of Joanne La Rocca (Apr. 6,1983). .....

2. Claim Under Section 12(2)

Plaintiff claims that defendant violated S12(2) of the Securities Act,15USC 771(2)(1976), by making fraudulent omissions in the sale of securities. The securities at issue, United States Treasury Bonds and GNMA certificates, are "securities issued or guaranteed by the United States" and therefore are exempt securities under 3(a)(2) of the Securities Act, 15 U.S.C.1723c (1976); Davidson v. Dean Witter Reynolds,Inc., 478 F.Supp.494,495 (D.ColO.1979). Plaintiff's claim is dismissed with prejudice. .....

APPENDIX C.1

ORDER-$7,937 Attorney Fees-No.84-7535

(Filed MAY 1 1985)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May, one thousand nine hundred and eighty-five.

ERNEST R. ZERMAN,
Plaintiff-Appellant,

-against-

84-7535

PRUDENTIAL-BACHE SECURITIES,
LOREN P. LYON,
THE NEW YORK STOCK EXCHANGE INC,
and IRENE SCHONZEIT.

Defendants-Appellees.

Appellee, the New York Stock Exchange having submitted a claim for attorney's fees in the amount of seven thousand nine

hundred thirty-seven dollars and fifty cents ($7937.50) in accordance with this court's decision of January 31, 1985 which assessed appellant Zerman "reasonable attorney's fees of all appellees" and appellant having filed no objection to said claim,

UPON CONSIDERATION THEREOF, it is

ORDERED that an attorney's fee in the amount of seven-thousand nine hundred thirty seven dollars and fifty cents ($7,937.50) be assessed against appellant Ernest R. Zerman in favor of appellee, The New York Stock Exchange, Inc.

ELAINE B. GOLDSMITH, Clerk

by Arthur Heller
Arthur Heller, Deputy
Clerk

APPENDIX C.3

ORDER-$4000 Attorney Fees-No.84-7535

(FILED MAY 1 1985)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May, one thousand nine hundred and eighty-five.

ERNEST R. ZERMAN, Plaintiff-Appellant, -against- PRUDENTIAL-BACHE SECURITIES LOREN P. LYON, THE NEW YORK STOCK EXCHANGE, INC., and IRENE SCHONZEIT, Defendants-Appellees.	Docket No. 84-7535

Prudential-Bache Securities, Loren P. Lyon appellees, and Irene Schonzeit having submitted a claim for attorneys fees

in the amount of four thousand dollars ($4000.00) in accordance with this court's decision of January 31, 1985 which assessed appellant Zerman "reasonable attorney's fees of all appellees" and appellant having filed no objection tosaid claim,

UPON CONSIDERATION THEREOF, it is

ORDERED that an attorney's fee in the amount of four thousand dollars ($4000.00) be assessed against appellant Ernest R. Zerman in favor of appellees Prudential-Bache Securities, Loren P. Lyon and Irene Schonzeit.

ELAINE B. GOLDSMITH, Clerk

by Arthur Heller

Arthur Heller, Deputy Clerk

APPENDIX C.5

ORDER DENYING REHEARING-No.84-7535

(FILED MAR 20 1985)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of March, one thousand nine hundred and eighty-five.

- - - - - - - - - - - - - - - -

ERNEST R. ZERMAN,

Plaintiff-Appellant,

v.

BACHE HALSEY STUART SHIELDS, INC., LOREN P. LYONS, NEW YORK STOCK EXCHANGE, INC and IRENE SCHONZEIT,

Defendants-Appellees.

No.84-7535

- - - - - - - - - - - - - - - -

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plain-

tiff-appellant, Ernest R. Berman, pro-se

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT -APPENDIX D.1

No. 287 — August Term, 1984

(Argued: Nov. 19, 1984 Decided: Dec. 13, 1984)

Docket No. 84-7373

ERNEST R. ZERMAN,

Plaintiff-Appellant,

—against—

HARRY A. JACOBS, JR., individually,
H. VIRGIL SHERRILL, individually, and
BACHE HALSEY STUART SHIELDS INC.,

Defendants-Appellees.

Before:

LUMBARD, MANSFIELD and CARDAMONE, *Circuit Judges.*

Plaintiff-appellant, Ernest R. Zerman, appeals from an order of the United States District Court for the Southern District of New York (Weinfeld, *J.*) that denied his Fed. R. Civ. P. 60(b) motion to set aside an order confirming an arbitration award in favor of defendants, Bache Halsey Stuart Shields Inc. and two of its officers.

Affirmed.

ERNEST R. ZERMAN, *Pro se*, Hallandale, Florida for *Plaintiff-Appellant.*

D.2 - MICHAEL STRAUSS, New York, New York (Jeh Charles Johnson, Sullivan & Cromwell, New York, New York, of counsel) *for Defendants-Appellees.*

PER CURIAM:

When a party, after engaging in a course of harassing litigation, appeals the denial of a Rule 60(b) motion on patently frivolous grounds, double costs plus attorneys fees should be assessed under Federal Rule of Appellate Procedure 38. Ernest R. Zerman, a lawyer, appeals from an order of the United States District Court for the Southern District of New York (Edward Weinfeld, *J.*) that denied his Rule 60(b) motion to set aside that court's order, which confirmed an arbitration award and entered judgment in favor of defendants Bache Halsey Stuart Shields Inc., the name of which has been changed to Prudential Bache Securities Inc. ("Bache"), and two of its officers. We affirm.

I

Plaintiff Zerman originally brought this action in June 1980 alleging claims under the Securities and Exchange Act of 1934, rules of the National Association of Securities Dealers, and state and common law in connection with a margin securities account he maintained with defendant Bache. Bache counterclaimed. The substance of plaintiff's claims were discussed in detail in an opinion by the district court. *See Zerman* v. *Jacobs*, 510 F. Supp. 132 (S.D.N.Y.), *aff'd*, 672 F.2d 901 (2d Cir. 1981). In that opinion the district court stated that "plaintiff, seizing upon a mere computer error, is attempting to convert it into a claim of fraud under the

federal securities laws." *Zerman*, 510 F. Supp. at 184. Concluding that Zerman "failed to state a proper claim under any provision of the federal securities laws," *id.* at 135, the district court granted Bache's motion to compel arbitration on the state and common law claims based upon plaintiff's agreement to arbitrate all claims arising out of his brokerage account. We affirmed the district court's decision by summary order. *Zerman*, 672 F.2d 901.

Zerman thereupon proceeded to file a series of motions in an effort to resist arbitration. After he had engaged in twenty months of delaying tactics, the district judge enjoined him from filing further motions until his claims were resolved in arbitration. Again plaintiff took an appeal that was unsuccessful. *Zerman* v. *Jacobs*, No. 80 Civ. 3570 (S.D.N.Y. Nov. 12, 1982), *appeal dismissed*, No. 82-7915 (2d Cir. Apr. 29, 1983). In January 1984, when plaintiff failed to appear at the scheduled arbitration, the arbitrators awarded Bache $47,234.57 with interest on its counterclaim. On March 8, 1983 the district court confirmed the arbitration award and entered judgment against plaintiff.

Over a year later, in April 1984, plaintiff moved before the district court under Rule 60(b) to set aside the final judgment. Zerman argued that a newly promulgated SEC Rule, 17 C.F.R. § 240.15c2-2 (1984), constituted "newly discovered evidence" under Rule 60(b)(2), and that legal arguments made by defendant's counsel as to the applicability of the Supreme Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), constituted "misrepresentation, or other misconduct of an adverse party" under Rule 60(b)(3). The district court, its patience tried by plaintiff's "course of harassing litigation," denied

D.4 the motion. Judge Weinfeld's conclusion was concise: "The grounds asserted for vacatur of the judgment are so patently frivolous as to merit no discussion. The application is denied." *Zerman* v. *Jacobs*, No. 80 Civ. 3570 (S.D.N.Y. Mar. 31, 1984). Undaunted by the district court's message, plaintiff appeals again.

II

SEC Rule 15c2-2, promulgated by the Securities and Exchange Commission, 17 C.F.R. § 240.15c2-2,[1] does not

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[1] § 240.15c2-2 Disclosure regarding recourse to the courts notwithstanding arbitration clauses in broker-dealer customer agreements.

(a) It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the Federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.

(b) Notwithstanding paragraph (a) of this section, until December 31, 1984 a broker or dealer may use existing supplies of customer agreement forms if all such agreements entered into with public customers after December 28, 1983 are accompanied by the separate written disclosure:

Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the federal securities laws but instead can resolve any such dispute or controversy through litigation in the courts.

(c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983 if:

(1) Any such public customer for whom the broker or dealer has after July 1, 1983 (i) carried a free credit balance, or (ii) held securities for safekeeping or as collateral, or (iii) effected a securities transaction is sent, no later than December 31, 1984, the disclosure prescribed in paragraph (b) of this section; or

(2) Any other public customer is sent upon the completion of his next transaction pursuant to such agreement, the disclosure prescribed in paragraph (b) of this section.

D.5 constitute "newly discovered evidence" that justifies granting relief from the judgment within the meaning of Rule 60(b)(2) of the Federal Rules of Civil Procedure. Nor does this Rule issued in 1983 retroactively invalidate the 1977 agreement between Zerman and Bache. *See* SEC Rule 15c2-2(c).

SEC Rule 15c2-2, in any event, is not applicable here. In *Wilko* v. *Swan* the Supreme Court held that an agreement between a broker and customer to arbitrate federal securities law claims is unenforceable. The district court concluded, and we agreed, that Zerman could not avoid the arbitration provision of his customer agreement under *Wilko* v. *Swan* because he had failed to state a proper claim under any provision of the federal securities laws. *Zerman* v. *Jacobs*, 510 F. Supp. at 134-35. SEC Rule 15c2-2, restating the rule of *Wilko* v. *Swan*, only addresses the situation involving disputes between broker and customer "arising under the Federal securities law." SEC Rule 15c2-2(a). It therefore cannot serve as a basis for setting aside this judgment under Rule 60(b)(2). In light of the district court's holding that Zerman's complaint fails to state a claim under the federal securities laws, and our affirmance of that order, defense counsel's argument that *Wilko* v. *Swan* has no application to this case obviously does not constitute "misrepresentation, or other misconduct of an adverse party" within the meaning of Rule 60(b)(3). Thus, there is no basis for setting aside the judgment.

This appeal is frivolous. Plaintiff, having kept this lawsuit going for over four years, is making his third trip to this Court. He continues to relitigate the same issue that the district court decided and we affirmed in

D.6-1981.[1] Plaintiff has cast his line one time too many. As a consequence, Zerman is assessed double costs in this Court plus $2,500 damages for taking a frivolous appeal, payable to Prudential Bache Securities Inc. within fourteen days of the issuance of this order. See Fed. R. App. P. 38.

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[1] Plaintiff has brought other actions on issues apparently similar to the present case. *See Zerman v. Bache Halsey Stuart Shields Inc.*, No. 83 Civ. 7980 (S.D.N.Y. May 7, 1984); *Zerman v. Cowen*, No. 82 Civ. 1232 (S.D.N.Y. Feb. 9, 1983).

We note that plaintiff's wife has brought suit against different brokerage houses also alleging circumstances of fraudulent conduct similar to the present case. *See Zerman v. Melton*, 735 F.2d 751 (2d Cir. 1984); *Zerman v. Ball*, 735 F.2d 15 (2d Cir. 1984). Although in *Melton* we denied appellee's motion for double costs and attorney's fees, we warned that "repetitive and baseless claims brought to recoup investment losses may lead to such an award." *Zerman v. Melton*, 735 F.2d at 752.

APPENDIX D.7

ORDER DENYING REHEARING- NO. 84-7373

(Filed- Mar 6, 1985)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 84-7373

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of March, one thousand none hundred and eighty-five.

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ERNEST R. ZERMAN,

Plaintiff-Appellant,

-against-

HARRY A. JACOBS,Jr., individually, H. VIRGIL SHERRILL, individually, and BACHE HALSEY STUART SHIELDS INC.,

Defendants-Appellees.

- -

A petition for rehearing contained a suggestion that the action be reheard in banc having been filed herein by Attorney

Appendix D.8

Pro se, Ernest R. Zerman.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B.Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX D.9

MEMO ENDORSED OPINION S.D.N.Y.-80 Civ.3570

(FILED APR 2 1984)

MEMO ENDORSED

ZERMAN v. JACOBS
80 Civ. 3570 (EW)

Plaintiff, an attorney who clearly has embarked upon a course of harassing litigation, moves pursuant to Fed.R.Civ.P.60(b) to vacate the Court's March 7,1983 judgment confirming an arbitration award entered against plaintiff after the Court granted defendants' motion to compel arbitration of plaintiff's claims. (Zerman's note-plaintiff's claims had already been dismissed). Zerman v. Jacobs, 510 F.Supp.132 (S.D.N.Y.),aff's,672 F.2d901(2d 1981).

The grounds asserted for vacatur of the judgment are so patently frivolous as to merit no discussion. The application is denied.

Plaintiff's attention is directed to Fed.R.Civ.P. 11,as amended, and to the

inherent equitable power of the Court to assess fees against a party who has "acted in bad faith, vexatiously, wantonly, or for appressive reasons." Tedeschi v. Smith Barney, Harris Upham & Co., 81 Civ. 6938, slip op. at 3 (S.D.N.Y. January 17, 1984), quoting Alyeska Pipeline Co., v. Wilderness Society, 421 U.S. 240,258 - 59 (1975).

So ordered.

Dated: New York, New York
March 31, 1984

Edward Weinfeld

United States District Judge

APPENDIX- E

UNITED STATES CODE-CONGRESSIONAL AND ADMINISTRATIVE NEWS-91st CONGRESS-2nd SESSION-VOLUME 2-WEST PUBLISHING CO.

BANKS-RECORDS, TRANSACTIONS P.L.91-508

NEED FOR THE LEGISLATION

GENERAL DESCRIPTION OF THE BILL

The bill deals with two major problem areas in law enforcement. .....

page 4395

.....Part of the reason why section 7 was originally enacted in its present form may have been a concern over putting the small investor at risk as to whether his broker or lender was complying with the regulations. THE AMENDMENT HAS BEEN CAREFULLY DRAWN TO AVOID THIS RESULT.

page 4409

301.Amendment of section 7 of SEA of 1934

(b) Amendment made by (a) does not affect cntinuing validity of ..reg. under sec. 7

The Miami Herald

Insecure Industry

THE time clearly is now for Congress to put some controls on the peddlers of Government debt and for the Florida Legislature to insist that local governments employ more safeguards when investing public money. The possible loss of more than $300 million through ESM, a Fort Lauderdale securities firm, was perhaps a scandal waiting to happen in an unfettered industry. It had been foreshadowed by two other failures of similar firms.

Some 16 cities, including Pompano Beach and Tamarac, could lose $104 million invested in repurchase agreements with ESM. American Savings & Loan of Miami and six other savings institutions may have losses of up to $200 million. ESM's dealings with an Ohio savings and loan led to the closing of state-chartered institutions there.

In 1982, Drysdale Government Securities collapsed. Its president was sentenced to eight years in prison for fraud and ordered to repay $300 million. Last year, Lion Capital Group folded, owing local-government investors $40 million, including $4 million to the Duval County (Jacksonville) School Board.

quate capital reserves. Whether those measures are sufficient should be determined by thorough hearings by Congress. Dealers in securities issued by the private sector have been regulated by the Securities and Exchange Commission for five decades. Considering the size and complexity of the Government-securities scandals, similar controls well may be merited.